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No.

IN THE

Supreme Court of the United States

October Term, 1988

JACK R. DUCKWORTH, Superintendent,
and INDIANA ATTORNEY GENERAL,

Petitioners,

vs.

MCKINLEY DUDLEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit") conflicts with decisions of this Court, the Seventh Circuit and other circuit courts by presuming prejudice to a criminal defendant (McKinley Dudley) in a joint trial involving three co-defendants as the result of very brief testimony concerning a telephone threat received by a prosecution witness in circumstances where the prosecutor used the testimony for the probative reason of explaining the nervous demeanor of the prosecution witness and where the testimony did not implicate the defendant (McKinley Dudley) in the threat.

2. Whether the decision of the Seventh Circuit conflicts with prior decisions of this Court and the Seventh Circuit by presuming that accomplice testimony must be discounted as dubious as a matter of law and consequently concluding that any error resulting from the admission of the threat testimony was not harmless beyond a reasonable doubt, despite the strong evidence against Dudley, Dudley's inherently unbelievable story (as told in his testimony) and the lack of any showing of actual prejudice.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Jack R. Duckworth, (Superintendent, Indiana State Prison) and the Indiana Attorney General, respectfully request this Court issue a Writ of Certiorari to review the judgment of the Seventh Circuit, entered in Cause Number 86-2293 on August 8, 1988, which reversed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereinafter "District Court"), in Cause Number S85-491.

OPINIONS BELOW

The Opinion of the Seventh Circuit (No. 86-2293) issued on August 8, 1988, is officially reported as *Dudley v. Duckworth*,

854 F.2d 967 (7th Cir. 1988) *rehearing denied*, and a copy of that Opinion is appended hereto at page A-1. The Judgment and Memorandum and Order of the District Court, (No. S85-491), dated June 25, 1986, was not published, and is appended hereto at page A-29. The decision of the Indiana Supreme Court which unanimously affirmed the conviction of respondent Dudley is reported as *Dudley v. State*, 480 N.E.2d 881 (Ind. 1985).

JURISDICTION

The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. §1254(1) and Rules 17.1(a) and (c) of the Rules of this Court, to review a decision of a federal court of appeals that has decided a federal question in a way in conflict with a state court of last resort, the federal circuit courts and controlling decisions of this court.

The decision of the Seventh Circuit was entered August 8, 1988. A Petition for Rehearing of Respondents-Appellees (Petitioners in this Proceeding), Suggestion for Rehearing in Banc, and Appendix was timely filed on August 22, 1988. The Seventh Circuit denied the Rehearing Petition on November 7, 1988. This petition is timely filed in that it is filed within ninety (90) days of the denial of the Petition for Rehearing and prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides as follows:

> §1. Citizenship — Due process of law — Equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 2254 provides in relevant part as follows:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * *

(d) In any proceeding instituted in a Federal Court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF CASE

A. Nature of the Case

This petition arises from the reversal by the Seventh Circuit of a judgment by the District Court which had denied a petition for a writ of habeas corpus. The Seventh Circuit's judgment directs the District Court to grant the petition for a writ of habeas corpus provided the State of Indiana does not retry Dudley within a specified period.

B. Course of Proceedings Below

McKinley Dudley is a state prisoner who is presently incarcerated at the Indiana State Prison pursuant to his conviction of aiding a robbery, following a jury trial in October, 1982.

Dudley was sentenced to twenty (20) years imprisonment and a consecutive term of thirty (30) years for being an habitual offender. Dudley appealed, along with his two (2) co-defendants, and his conviction and sentence were affirmed by the Indiana Supreme Court. *See Dudley v. State*, 480 N.E.2d 881 (Ind. 1985). Dudley and his co-defendants raised 39 issues before the Indiana Supreme Court.

On August 20, 1985, shortly after the affirmance of his conviction, Dudley filed a Petition under 28 U.S.C. 2254 for Writ of Habeas Corpus by a Person in State Custody in the District Court. Thereafter, on September 24, 1984, he moved to amend his petition. The Response to the Order to Show Cause and the habeas petition was filed on November 24, 1985. Dudley filed a response on December 10, 1985, and on June 24, 1986, the District Court entered its Memorandum and Order and Judgment denying a writ of habeas corpus. The Judgment was filed June 25, 1986. *See* Appendix, pp. A-29 and A-40

Dudley timely filed his Notice of Appeal on July 23, 1986, and on July 25, 1986, he was granted a certificate of probable cause to appeal the District Court's determination. After Dudley filed a brief, *pro se*, on the appeal, the Seventh Circuit's proceedings were held in abeyance until counsel was appointed for Dudley on March 27, 1987. Thereafter, Dudley's counsel filed a supplemental brief in his behalf. Following briefing and oral argument, the Seventh Circuit issued its Opinion and Judgment on August 8, 1988, which reversed the District Court's decision. *See* Appendix, page A-1 and A-41. Under the terms of the Seventh Circuit's judgment, the District Court was directed to grant the petition for a writ of habeas corpus unless the State of Indiana retried Dudley within 120 days.

A Petition for Rehearing and Suggestion for Rehearing in Banc was timely filed in the Seventh Circuit on August 22, 1988, and the circuit court requested a response from Dudley's counsel. The Petition for Rehearing and Suggestion for Rehearing in Banc was denied on November 7, 1988. Appendix, p. A-42

C. Facts Material to Consideration of the Questions Presented

General facts relevant to this case were set forth in the opinion of the Indiana Supreme Court in *Dudley v. State*, *supra*, 480 N.E.2d at 889, as follows:

> On May 27, 1982, Edward Pointer, Kennis Butler and Rodney Phillips drove an Oldsmobile to Chesterton State Bank to commit a robbery. They had planned the robbery with McKinley Dudley, who had volunteered the use of his car and guns. McKinley followed the Oldsmobile part of the way to the bank, then parked where he was to later switch cars to facilitate his cohorts' escape. Once at the bank, Butler and Phillips, armed with handguns, entered. Butler pointed a gun at teller Kay Leggett, entered the tellers' area and removed approximately $8,835.00. Butler and Phillips then fled to the car where Pointer was awaiting them. The bank notified the Portage Police Department immediately thereafter.
>
> Officers Fred Trathen and Charles Heimberg, having received a radio dispatch about the robbery, observed and followed a car matching the description given over the dispatch. After the officers unsuccessfully attempted to stop the car, a high speed chase ensued. Phillips, sitting in the rear seat, fired four shots at Officer Trathen. The pursued car finally came to a sudden stop on the side of the road where all three passengers unsuccessfully attempted to flee; they were caught shortly thereafter.

Three witnesses provided strong evidence that Dudley was an active participant in the robbery, including Edward Pointer and Cecil Lewis who admitted their own knowledge of the robbery (R. 619-657, 1266-1294). Lewis indicated that he had known Dudley for about twenty years. The plan was discussed in Dudley's presence two days before the robbery of the Chesterton Bank (R. 1270-1273).[1] The robbery was also discussed the day before at Dudley's house (R. 1274). According to Lewis, the robbers, including Kenny (Kennis

[1] "R" stands for the State Court Appellate Record of Dudley's trial.

Butler) got guns from Dudley (R. 1275-1276, 1282-1283). When the guns were taken, Dudley was already aware of the robbery plans (R. 1284). There was a meeting at the Nova Lounge on the day of the robbery, involving Dudley, Lewis, Pointer and Phillips (R. 1285). The cars being driven were Dudley's green Cadillac and the blue and white oldsmobile that belonged to Dudley's girlfriend (R. 1277-1278, 1282, 1283). Dudley said he would drive the Cadillac, and Pointer was given the blue oldsmobile by Dudley (R. 1286). The party drove out to rob Chesterton State Bank, and Dudley and Lewis drove to the drop off point (where the cars were going to be switched after the robbery) (R. 1287). Dudley, however, did not like the drop off point because it was in the woods (R. 1289-1291). Dudley drove away from the switch point because he did not like it (R. 1291). All of the men, including Dudley, were to get a split of the bank robbery money (R. 1294).

On the day of the robbery, Pointer was picked up in Dudley's Green Cadillac (R. 634). While Pointer did not recall Dudley being involved in planning the robbery prior to the day it occurred, Pointer recalled that there was prior planning (R. 628). Pointer, who was riding in the Cadillac, stated that they ran across Dudley who was driving the blue Oldsmobile, and they went to the Nova Lounge (R. 637-638). This is essentially what Lewis said (R. 1285). Dudley told Pointer at the Nova Lounge that the men were going to be using his car and guns (R. 638), and Dudley even checked the gun being carried by Butler (R. 642). Lewis' understanding was the same (R. 1275-1278, 1282-1284). Pointer, like Lewis, understood that the men, including Dudley, had agreed while they were at the Nova Lounge that they would all get an equal share of the bank robbery proceeds. (R. 644, 1294). Dudley drove his own car (the Cadillac) just like Lewis said (R. 641, 1286). Pointer, consistent with Lewis, testified that a switch point (where the parties in the blue car were to transfer to the Cadillac after the robbery) was shown to Dudley (R. 645-646, 1287). Dudley allowed Pointer, Butler and Phillips to take his girlfriend's blue Oldsmobile to the bank (R. 692). Consistent with Lewis'

testimony that Dudley did not like the drop off point (R. 1289-1291), Pointer testified that Dudley did not park where he was told (R. 656). According to Pointer, Dudley was not at the switch point after the robbery (R. 650-651, 653, 657).

Gerri Peters (Dudley's girlfriend) saw Dudley's guns prior to the robbery and identified them as the ones used in the actual robbery (R. 1343-1344, 1361). She also confirmed that Dudley borrowed her blue Oldsmobile because allegedly he was concerned about driving his Cadillac (R. 1347). Later, he told her he let a friend of his borrow her car (R. 1350). The next morning he left in his Cadillac (R. 1350). Later that day, Dudley came back and denied knowing where Peters' car was (R. 1351). She also confirmed that her car was the one being held by the Portage police (following capture of the robbers) (R. 1357-1358).

Regarding Pointer's testimony concerning his receipt of threatening phone calls from an unknown person, the Indiana Supreme Court found that Pointer had been nervous at the beginning of his testimony at the trial and concluded that admission of the threats testimony was proper to explain Pointer's nervous disposition to the jury. *Dudley v. State*, *supra*, 480 N.E.2d at 891.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS AND ITS OWN PRIOR DECISIONS BY PRESUMING THAT DUDLEY WAS PREJUDICED AS A MATTER OF LAW BY THE ADMISSION OF TESTIMONY OF TELEPHONE THREATS TOWARD WITNESS POINTER WHERE THE TESTIMONY WAS ELICITED TO EXPLAIN POINTER'S NERVOUS DEMEANOR ON THE WITNESS STAND

The Seventh Circuit focused on a very brief episode in a trial which lasted about two (2) weeks and concluded that a few

comments which were made by witness Pointer concerning some phone calls which he had received the night prior to his testimony, which he considered threatening to himself and his mother, deprived Dudley of a fundamentally fair trial in violation of the Fourteenth Amendment. *See* Appendix, pp. A-11 to A-13. The majority on the Seventh Circuit panel in this case opined that whatever nervousness may have been displayed by witness Pointer, the prosecution had no right to ask him why he was nervous and thereby elicit testimony concerning threats because "the admission of this threat testimony could not but deprive petitioner of his right to present an alibi defense to a jury free from evidential harpoons". (Appendix A-9).

The basic problem with the legal position taken by the Seventh Circuit is that prejudice to the criminal defendant need not be proven, it is presumed to be present whenever a witness testifies that he received a threatening phone call, even if the criminal defendant is not implicated in the threat. As recognized by Judge Coffey in his dissent, the conclusion that Dudley was denied a fundamentally fair trial was the result of a failure to apply established precedent of the Seventh Circuit and other federal circuit courts. Instead, the Seventh Circuit's majority opinion strangely applied Indiana appellate court decisions which were not even regarded as controlling by the Indiana Supreme Court.

What Circuit Judge Coffey recognized is that the majority cited the proper standard but actually applied a standard constituting a radical departure from that standard. Federal circuit courts, including the Seventh Circuit, have recognized that evidence that a witness was threatened may have probative value and must be weighed against the actual prejudice suffered by the criminal defendant resulting from the admission of such evidence. *United States v. Peters*, 791 F.2d 1270, 1291 (7th Cir. 1986); *United States v. Guerrero*, 803 F.2d 783, 786 (3rd Cir. 1986); *United States v. Qamar*, 671 F.2d 732, 736 (2d Cir. 1982).

The standard actually applied by the majority opinion was one adopted from language found in certain Indiana Appellate decisions which have not even been approved by the Indiana Supreme Court. As observed by Circuit Judge Coffey in his dissenting opinion:

> Surprisingly, the majority chooses to apply Indiana appellate case law, rather than federal case law (cited below) which holds contrary to the case at hand, calling threat evidence "so prejudicial to a defendant that no jury could be expected to apply it to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant." *Keyser v. State*, 160 Ind. App. 566, 569, 312 N.E.2d 922, 924 (1974).
>
> Despite this statement of Indiana law (which is clearly not controlling in a federal habeas case), properly applicable federal case law holds that threat testimony, whether allegedly linked to the defendant or giving the inference that the threats were made on behalf of the defendant, is judged in "the normal balancing processes of Fed. R. Evid. 403 balancing." *United States v. DeLillo*, 620 F.2d 939, 944 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980). As noted above, various federal courts have properly determined that threat testimony has probative value and does not necessarily unfairly prejudice a defendant.
>
> (Dissenting Opinion, Appendix p. A-19).

The State urges this Court to consider Judge Coffey's reasoning because contrary to the majority opinion, Judge Coffey reached a different result through application of the actual federal standard. In prior cases, the Seventh Circuit and other circuits have certainly not viewed "threat" evidence as automatically resulting in such prejudice to a criminal defendant that his trial must be considered fundamentally flawed. The federal standard requires balancing between the probative value of testimony and any prejudicial effect, and if the probative value of the testimony outweighs its prejudicial component, admission of such testimony is not deemed violative of fundamental due process. *United States ex rel.*

Palmer v. DeRobertis, 738 F.2d 168 (7th Cir. 1984), *cert. denied*, 469 U.S. 924; *United States ex rel. Durso v. Pate*, 426 F.2d 1083 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971). Since the majority opinion contravenes established precedent by its legal standard that prejudice and a due process violation must be presumed whenever testimony about threats against a witness is admitted at trial, regardless of the probative value of the testimony, review by this Court is certainly warranted.

The standard employed by the Seventh Circuit is detrimental to the proper administration of justice. This is certainly apparent by its employment in this case. McKinley Dudley's lengthy criminal sentence has been effectively vacated even though there is no reason to believe that admission of the threat testimony actually prejudiced him or contributed to his conviction. *See* harmless error discussion, *infra*. In this case, the state prosecutor had a very good reason for elicting the "threat" testimony, as factually determined by the Indiana Supreme Court. *See Dudley v. State*, 480 N.E.2d 881, at 891, (Ind. 1985). The Seventh Circuit's decision is contrary to precedent established by this Court. *See Sumner v. Mata*, 449 U.S. 539 (1981). Under *Sumner*, a federal court must accept a factual determination of a state court as correct unless the determination is clearly without factual support. 28 U.S.C. §2254 (d). The Seventh Circuit ignored the factual determination by the Indiana Supreme Court that witness Pointer was nervous during his testimony. The majority in the opinion of the Seventh Circuit did not conclude that the factual determination of nervousness was unsupported under the standard of 28 U.S.C. §2254. Instead, the majority questioned whether Pointer was actually nervous by second-guessing the state courts, including the state trial judge who had an actual opportunity to view Pointer's demeanor. Circuit Judge Coffey observed in his dissent:

> The majority questions whether Pointer was nervous in the first place, stating, "[i]t is difficult for us to detect 'any extreme nervousness' from the record." It is interesting to note that neither opposing counsel nor the trial judge

> contradicted the prosecutor's observation of nervousness and statement. I believe that the trial judge was in a far better position to make that judgment and make the proper ruling as he did in this case relating to the witness's demeanor, thus our review should be consequently deferential. Speculation by the majority as to witness's behavior is misplaced in this case considering we have nothing in the record before us to support the majority's conclusion. In weighing the effect of testimony, the trial court's "exercise of broad discretion will not lightly be disturbed[,]" *United States v. Williams*, 596 F.2d 44, 50 (2d Cir.), *cert. denied*, 442 U.S. 946 (1979), due to its proximity.
>
> (Dissenting Opinion Appendix, p. A-21).

The entire episode, which is the point of contention here, is fully reported in the Appendix, pp. A-11 to A-13. Contrary to the majority's unsupported speculation that the prosecutor put the threat ". . . before the jury under a pretext" (Appendix, A-7), it was witness Pointer who first articulated his nervousness. The prosecutor asked "Eddie, how do you feel about testifying here today?", and witness Pointer answered "Nervous, Really don't feel up to it" (Appendix, p. A-11). It was not necessary for the court reporter to inject editorial comments about Pointer's demeanor into the record because Pointer made it clear by his words that he was nervous. It was improper for the majority to speculate about Pointer's demeanor when the State Supreme Court determined Pointer had been nervous and when there was no dispute by defense counsel or the trial judge concerning the nervous state of Pointer.

The Seventh Circuit's decision is not merely contrary to precedent but deprives prosecutors of an opportunity to explain the nervous state or condition of important witnesses where the nervous state or condition has resulted from threats. Many courts have held that matters which reflect upon the credibility of a witness are certainly proper subjects for exploration at trial. *Saladino v. Walker*, 609 F.2d 1211, 1214 (7th Cir. 1979); *United States v. Aleman*, 609 F.2d 298, 307 (7th

Cir. 1979) *cert. denied*, 445 U.S. 946 (1980). Circuit Judge Coffey was certainly correct in stating that "[i]t is well known that the nervous demeanor of a witness can cast damaging suspicion of untruthfulness over a witness's testimony in a juror's mind" (Appendix, p. A-20) and "If we are to hold that a prosecutor is not allowed to explain a witness's nervous demeanor on the stand through proper questioning, the weight of his or her testimony will often be greatly diminished." (Appendix, p. A-21).

In this case, the so-called "threat" evidence had legitimate and substantial probative value by explaining Pointer's nervous demeanor. In this case, any actual prejudice to Dudley was outweighed by the probative value of the testimony. *See*, Discussion of this matter by Circuit Judge Coffey, Appendix, p. A-20. Review by this Court is necessary to prevent the establishment of a legal standard relating to "threat" testimony which fails to take into account the interest of society in affirming criminal convictions where minor errors have not actually prejudiced the criminal defendant.

II.

THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE CIRCUIT COURTS BY PRESUMING THAT ACCOMPLICE TESTIMONY MUST BE DISCOUNTED AS DUBIOUS WHEN A COURT CONSIDERS WHETHER AN ERROR IS HARMLESS BEYOND A REASONABLE DOUBT

The majority in the Seventh Circuit's opinion found the evidence of Dudley's guilt "impressive" but "not overwhelming" (Appendix, p. A-9), apparently because it presumed that two witnesses (Lewis and Pointer) were dubious witnesses merely because they were among Dudley's accomplices. Somewhat inconsistently, the majority also stated, that Dudley "deserves to be retried" (Appendix, p. A-10), apparently because of the impressive evidence against him. This decision of the majority, finding that any error in the admission of the threat testimony

did not amount to harmless error, is inconsistent with prior decisions of this and other federal courts. Again, Circuit Judge Coffey recognized that the evidence against Dudley was overwhelming and that "any trial court error in admitting that testimony was 'harmless beyond a reasonable doubt'." (Appendix, A-15).

Rather than reiterating the overwhelming evidence against Dudley at this point, the State incorporates by reference the facts set out in the "Statement of the Facts" to this brief and the facts stated in Judge Coffey's dissenting Opinion (Appendix, pp. A-15 to A-19 and A-24 to A-27).

Under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 828 (1967), there is no basis for voiding a criminal conviction where trial court errors are "harmless beyond a reasonable doubt." The real question is whether there is a reasonable possibility that the evidence in question contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 230 (1963). The problem is that the majority in the Seventh Circuit did not apply this standard.

By constructing a legal standard which effectively discounts the value of accomplice testimony, the Seventh Circuit has departed from the harmless error analysis required by *Chapman* and *Fahy*. Circuit Judge Coffey in his dissent observed that the majority had no legal basis for discounting the testimony of Pointer and Lewis. (Appendix, pp. A-25 to A-27). As properly observed by Judge Coffey, courts are supposed to draw inferences favorable to the government where sufficiency of the evidence is in question. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). Moreover, it was not the place of the majority to take on the jury's job and reevaluate the credibility of Pointer and Lewis. *United States v. Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987). Instead of determining whether the "threat evidence" contributed to or was a cause of Dudley's conviction, the majority reevaluated the testimony of Lewis and Pointer, and by legally discounting that testimony, came to the conclusion that the State's evidence

against Dudley was merely impressive, and not overwhelming. The majority of the Seventh Circuit points to no substantial reason in the record to legally assume that the testimony of Lewis and Pointer must be treated as suspect or dubious. Any deals for their testimony were fully disclosed to the jury. The majority certainly cites no legal authority for its position.

Since the Seventh Circuit does not consider whether the threat evidence contributed to Dudley's conviction, it is obvious that the majority was actually evaluating the sufficiency of the evidence against Dudley and essentially found that Lewis and Pointer's testimony was not strong enough because they were Dudley's accomplices. However, the decision in *Jackson v. Virginia, supra* does not permit a circuit court to invade the province of the jury. That decision requires the circuit courts to view the evidence in a light favorable to the prosecution because the jury had decided the criminal defendant was guilty and any other assumptions would invade the province of the jury by redetermining credibility issues.

The brief mention of the threats in Pointer's testimony has never been shown to have contributed to Dudley's conviction. Five justices of the Indiana Supreme Court, a federal district court judge and circuit judge Coffey saw no prejudice to Dudley from the threat testimony. Not even the majority in the Seventh Circuit's decision found that Dudley was actually prejudiced by the testimony, as noted above. They presumed prejudice. Circuit Judge Coffey properly explained why the error, if any, was indeed harmless, as follows:

> It was part of a brief exchange that represented only two and one-half pages in a trial transcript of more than 1,400 pages in a trial of over two weeks' duration, and it was testimony that was never even referred to again by either party.
>
> * * *
>
> Defense counsel had ample opportunity, on cross-examination, in closing argument, and in post-trial motions to address the pertinent testimony but chose not

to, thus convincing me, as it did the habeas court, of the insignificant part it played in convicting Dudley.

The testimony of Lewis, a 20-year associate of Dudley and a co-conspirator in the bank robbery, and the testimony of Peters, Dudley's girlfriend, directly linked Dudley to the crime and was no doubt considered "overwhelming" in the jury's mind. Additionally, Pointer's corroborating testimony and the lack of a valid and truthful alibi by Dudley obviously left no doubt in the jury's mind of his guilt.

Dudley's alibi lacks believability. He claims that he traveled to Aetna with Lewis in order to fix a broken down car. In-explicitably, the pair wound up in Portage, 15 miles away, where the bank robbery took place. In his testimony, Dudley claimed he was unaware of what was to take place in Portage. I find it impossible to believe, as did the jury, the naivete of a 47-year-old habitual criminal who has spent more than one-half of his life (approximately 25 years) in prison and who, according to witnesses, was the mastermind in the planning of the bank robber.

* * *

Dudley, in organizing the bank robbery, participated in several discussions of the robbery plan prior to the actual crime, including the one that took place in his own home. Secondly, he supplied the necessities, the cars and guns, to facilitate the plan and even went so far as to check out the operating capabilities of one of the co-defendant's guns prior to the bank robbery. He was present when the parties agreed to the division of the robbery loot equally. He drove with Lewis to the planned switching point where the robbers were going to change cars after the bank robbery. He told his girlfriend that he let "a friend" use her car when in fact he planned for its use in facilitating the robbery. And finally, he offers no valid explanation for his presence in Portage on the day the armed robbery took place. I am convinced, as was the jury, the Indiana Supreme Court, and the district court, that the evidence of Dudley's guilt was "overwhelming."

(Appendix, pp. A-24 to A-25).

The strength of the State's case actually took on added significance because Dudley's story was inherently unbelievable. To the extent the majority gave any credit to Dudley's story, the decision is contrary to prior precedent. *For example, see Phelps v. Duckworth*, 722 F.2d 1410 (7th Cir. 1985).

The Seventh Circuit's decision represents a serious intrusion on the power of the Indiana state courts to make evidentiary rulings without unwarranted second-guessing by the federal courts. Dudley's trial was fundamentally fair, and the State should not be required to again prove his guilt.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 86-2293

MCKINLEY DUDLEY,

Petitioner-Appellant,

v.

JACK DUCKWORTH, Warden, and
INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 85 C 491—**Allen Sharp**, *Chief Judge.*

ARGUED FEBRUARY 17, 1988—DECIDED AUGUST 8, 1988

Before BAUER, *Chief Judge*, WOOD, JR. and COFFEY, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* McKinley Dudley, petitioner-appellant, was convicted by a jury in an Indiana state court of aiding a bank robbery for which codefendants Kennis Butler and Rodney Phillips were convicted in the same trial.[1] The Indiana Supreme Court affirmed their convic-

[1] Dudley received a twenty-year sentence for aiding the bank robbery and a thirty-year sentence for being a habitual offender, to be served consecutively. Dudley's codefendants each received twenty-year sentences for bank robbery plus four-year sentences for criminal recklessness.

tions after reviewing numerous alleged errors.[2] Thereafter, Dudley filed this petition for writ of habeas corpus under 28 U.S.C. § 2254. The principal claims Dudley raises in this appeal are that comments by the prosecutor about Dudley's silence violated his rights under the fifth and fourteenth amendments, and further, that the admission of prejudicial and irrelevant evidence violated his fourteenth amendment rights. We need reach only this latter issue.

I. FACTUAL BACKGROUND

The state charged that four people, Kennis Butler, Rodney Phillips, Edward Pointer, and petitioner-appellant McKinley Dudley, along with Cecil Lewis,[3] on May 27, 1982, executed an armed robbery of a state bank.

The evidence showed that Pointer, Butler, and Phillips drove a blue Oldsmobile to the bank. Butler and Phillips, armed with hand guns, entered the bank and escaped with $8,835. Pointer waited outside in the car to facilitate their escape. After a high-speed chase, during which Phillips fired at the pursuing police, all three were captured and the stolen money recovered.[4]

The state's evidence showed that the participants discussed the robbery several days beforehand in Dudley's presence, and again at Dudley's house the day before the robbery occurred. The evidence also showed the other participants obtained guns from Dudley. Another meeting, attended by all participants, was held at a tavern on the day of the robbery. All defendants agreed to split the proceeds of the bank robbery. The state's evidence further showed that a green Cadillac owned by Dudley was to

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[2] *Dudley v. State*, 480 N.E.2d 881 (Ind. 1985).

[3] Cecil Lewis, although he admitted participation, avoided being charged as he was given immunity and thereafter cooperated with the prosecution and implicated Dudley.

[4] 480 N.E.2d at 889.

be used as a switch getaway car, and a blue Oldsmobile belonging to Dudley's girlfriend was to be used by the three defendants initially to go to the bank. When Pointer, Butler, and Phillips left in the Oldsmobile for the bank Dudley and Lewis drove the Cadillac to the prearranged switch point. Dudley decided when he arrived at the switch point that it was not a suitable place so he and Lewis abandoned the project and drove off toward Gary, Indiana. Dudley was arrested after his girlfriend went to the police station to retrieve her misused Oldsmobile.

Dudley testified in his own behalf, denying any participation in the bank robbery, and explained his contacts with the defendants as resulting merely from an agreement he had made with Lewis to fix a friend's car, which just happened to be on the day of the bank robbery.

II. DISCUSSION

Pointer, originally a codefendant who agreed to testify for the state in exchange for a reduced sentence, was called as a state witness against Dudley. The direct examination began by his answering what his name was, where he lived (with his aunt in Gary, Indiana), where his mother lived (in Chicago), and his age (twenty-three).

Immediately after these few preliminary questions, the prosecutor began the inquiry which, with the responses of the witness, constitutes the challenged testimony. Pointer was then asked "how he felt about testifying." "Nervous" was his response. The prosecutor pursued the subject, asking why he was nervous and what had happened to make him nervous. The witness, Pointer, explained that the prosecutor "kind of upset me this morning." He then added that he had received some phone calls the night before which were intended for him and his mother. He did not know who made the phone calls. Then came a leading question: "Are you afraid for your girlfriend and your aunt if you testify?" "Yes," Pointer responded. Upon being asked what he was afraid of, he explained that he was afraid that whoever had made the

phone calls might threaten or harm his mother, "or anything." At sidebar counsel objected to that line of questioning and asked that it be stricken, moving for a mistrial on the basis that the state was trying to prejudice the defendants by linking the anonymous threats to them. There was nothing, counsel argued, to show that the defendants had anything to do with the alleged phone call threats. The prosecutor defended the question as an attempt to explain the demeanor of the witness and how the witness felt about testifying. In reply, defense counsel argued that the prejudicial effect outweighed any potential relevance to Pointer's demeanor. The prosecutor then added in justification of the testimony that there had been no showing as to who made the phone calls. Defendant's counsel explained that that was exactly his point, a point which also concerns us.

The trial court denied both the mistrial motion and the motion to strike the testimony. The testimony was allowed to stand.[5] The admission of that evidence, petitioner argues, violated his fourteenth amendment protections because the threats admittedly came from an unknown source and were not linked to him or his codefendants except by prejudicial innuendo. That argument for the exclusion of the testimony is the same argument which we understand the state to be using in this court to justify its admission. Both parties cannot be correct. Because the threats were not connected in the evidence to any of the defendants, as the state admits, the state claims that the testimony could not be prejudicial to the defendants. In addition, the state argues that the threat evidence was relevant to Pointer's demeanor on the witness stand. The state further argues that the jury's interest in understanding the reason for Pointer's nervousness was not outweighed by the possible prejudicial effect of threatening telephone call evidence. The Supreme Court of Indiana found that

[5] The transcript of this portion of the trial is attached as an appendix.

the trial court did not abuse its discretion by admitting the evidence. *Dudley v. State*, 480 N.E.2d 881, 900 (Ind. 1985). The state supreme court adopted the state's explanation that the testimony about the anonymous phone calls was necessary to explain Pointer's "extreme nervousness." The district judge subsequently found that the Constitution was not implicated by this exchange because it was a very small incident in a fairly lengthy proceeding and did not amount to a denial of fundamental fairness.

There is at least some agreement between the parties as to the standard of review for this issue. As the petitioner recognizes, the admissibility of evidence is generally a matter of state law. *United States ex rel. DiGiacomo v. Franzen*, 680 F.2d 515, 517 (7th Cir. 1982); *United States ex rel. Clark v. Fike*, 538 F.2d 750, 757 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977). A writ of habeas corpus should issue, however, when an erroneous evidentiary ruling "is of such magnitude that the result is a denial of fundamental fairness." *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, 170 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984); *see also Love v. Young*, 781 F.2d 1307, 1312 (7th Cir.), *cert. denied*, 476 U.S. 1185 (1986); *Cramer v. Fahner*, 683 F.2d 1376, 1385 (7th Cir.), *cert. denied*, 459 U.S. 1016 (1982). In determining whether a writ should issue, the court must determine "whether the probative value of the evidence outweighs the prejudice to the accused." *Palmer*, 738 F.2d at 171; *United States ex rel. Durso v. Pate*, 426 F.2d 1083, 1086 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971).[6]

Indiana courts have held that a witness's testimony concerning threats the witness has received when no connection is shown between the defendant and the threats, can amount to an "evidential harpoon." *Keyser v. State*, 160 Ind. App. 566, 312 N.E.2d 922, 924 (1974); *see also Cox v. State*, 422 N.E.2d 357, 360-63 (Ind. App. 1981). "[S]uch

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[6] This standard is parallel to the standard of review in a direct appeal. *Durso*, 426 F.2d at 1086.

evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant." *Keyser*, 160 Ind. App. at 569, 312 N.E.2d at 924. In the *Keyser* case, the court found the testimony's prejudicial effect on the defendant to be so great that an instruction to the jury to disregard it was not sufficient to expiate its effect. That error, when combined with others, led the court to reverse and remand the case for a new trial.

In *Cox*, a witness testified that he had received threats regarding his testimony at trial. Although the people who threatened the witness knew he was testifying against Cox, the defendant, there was no evidence that Cox was responsible for or had knowledge of the threats. The trial judge, noting that evidence of threats generally must be connected to the defendant, ruled that this was not necessary where the witness was confined to prison from the date of the alleged offense until the date of trial. 422 N.E.2d at 361. The appellate court found no support for this exception, and ruled that the testimony should have been excluded. *Id.* at 361-62. "Since threats tend to show guilty knowledge or an admission of guilt on the part of the defendant, a proper foundation must be laid showing the threats were made either by the defendant or with his or her knowledge or authorization." *Id.* "Barring such a showing, the highly prejudicial nature of such testimony requires its exclusion." *Id.* at 362.

The Indiana Supreme Court did not mention these prior Indiana appellate court cases in its opinion, nor does the state in its brief in this court. Instead, the supreme court emphasized that the prosecutor made it clear to the trial judge that the testimony was to "explain witness Pointer's extreme nervousness." 480 N.E.2d at 900. It is difficult for us to detect any "extreme nervousness" from the record. The prosecutor argued to the trial judge only that she should be permitted to explain the "demeanor" of the witness and why the witness was in the condition that he was. Exactly what Pointer's condition may have been,

however, is not described. No clues appear in the record. The prosecutor further argued that her purpose was to explain "just how the witness feels about testifying here." The feelings of the witness about testifying would ordinarily be of no relevance. The trial judge did not make any observation in the record about the witness's condition or behavior.

It is also interesting to note that when the prosecutor asked, "What has happened to make you nervous, Eddie?" Pointer's first response was, "You kind of upset me this morning," adding only after that, "and I got some phone calls last night." It appears that Pointer blamed the prosecutor for contributing to his nervousness because of something she allegedly did or said that morning. The prosecutor proceeded with the additional leading question about Pointer's fears for his girlfriend and aunt. Nothing appears in the record, however, to explain what the prosecutor herself may have said or done to make the witness nervous. The prosecution avoided any explanation of that aspect of the nervousness of the witness.

Going by the record, which is all we have, we find nothing to show nervousness on the part of the witness except the suggestion initiated by the prosecutor's question about how the witness felt about testifying. The transcript reflects no incoherence, no delay in the witness's responses to questions. No one requested, for instance, a short recess to give the witness an opportunity to compose himself. He was given no opportunity to settle down, assuming he was unduly nervous. It clearly appears that the prosecutor's intent was to put the threat evidence before the jury as soon as Pointer took the stand. As soon as the threat evidence was presented there seems to have been no further concern with his nervousness. After Pointer told about the anonymous threats, all seems to have gone well. This record suggests to us the strong possibility that the prosecutor intended to get the threat testimony before the jury under a pretext. Nervousness is not an uncommon condition affecting witnesses. Those natural anxieties, without more, cannot be a means of admitting otherwise

prejudicial evidence. A court may attempt in other ways, at least initially, to make it easier for an anxious witness to proceed. Nervousness often quickly dissipates after the first few questions.

In considering the petitioner's alibi defense, his credibility, because he testified in his own behalf, takes on added significance. Pointer's threat testimony could only reflect adversely on the petitioner even though the threats were not traced to him or his codefendants, except by innuendo. The fact that the supreme court decided this and other issues does not end our own inquiry; in reviewing the denial of the petition for a writ of habeas corpus we must consider these issues in their constitutional context. *See Shillcutt v. Gagnon*, 827 F.2d 1155, 1158 (7th Cir. 1987).

The Supreme Court of Indiana found that the defendant was not subjected to "grave peril" by the admission of the testimony. *Dudley v. State*, 480 N.E.2d at 900. That court had earlier applied the "grave peril" standard in *White v. State*, 257 Ind. 64, 272 N.E.2d 312, 319-20 (1971). White was convicted of theft. The issue was the prejudice resulting from the brief testimony of a police officer who said he had previously seen the defendant when he was brought into the police station "with reference to an armed robbery case." 272 N.E.2d at 313. That robbery case was unrelated to the charge being tried, and the witness had no knowledge of defendant's alleged involvement with the crime for which he was being tried. The state argued the evidence was only for identification purposes. The trial court struck the testimony, but denied the motion for mistrial. The Supreme Court of Indiana (asking, "Identification of what?") reversed, concluding that the prejudicial testimony was offered for no other reason than to prejudice the jury, a prejudice no instruction could erase. *Id.* at 319. It had placed the defendant in a position of "grave peril." *Id.* at 320.

The situation here is somewhat similar to that in *White*. The record strongly suggests that the evidence of threats was intended more to prejudice the defendants, including

petitioner, than to explain away any nervousness of the witness. We believe that more was at issue in the present case than a mere abuse of discretion as found by the state supreme court. This error appears to us to be of constitutionally significant proportions. When the prejudicial effect of the testimony is weighed against its necessity, even assuming the witness's nervousness was extreme, which seems to exaggerate the record, we find that the resulting prejudice mandates relief. We need not try to apply the "grave peril" Indiana standard, however, because we find that the trial court's ruling allowing the testimony to stand "is of such magnitude that the result is a denial of fundamental fairness." *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, 170 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984). The admission of this threat testimony could not but deprive petitioner of his right to present an alibi defense to a jury free from "evidential harpoons." We find the error amounts to a violation of the petitioner's fourteenth amendment right.

We do not believe that this error can be considered harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1016 (7th Cir. 1987). The evidence of petitioner's guilt was impressive but not overwhelming. *Savory*, 832 F.2d at 1020. In a trial that lasted more than two weeks and involved approximately thirty-three witnesses, only two witnesses, Lewis and Pointer, implicated the petitioner in the robbery. Lewis and Pointer, admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses. The strength of their sometimes conflicting testimony does not approach the level required to render this constitutional error harmless.[7]

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[7] The petitioner also challenges the propriety of a subsequent exchange between the prosecutor and the witness Pointer. Pointer, on direct examination, was questioned about when he first heard about the contemplated bank robbery. Pointer answered that it

(Footnote continued on following page)

Although we find we must differ with the judgments of the Supreme Court of Indiana and the district court on this particular issue, we do so reluctantly and with respect for both courts. Even in close questions, however, we are bound to determine the constitutional issues as we see them. This "evidential harpoon" error, to borrow the words of the Indiana appellate court in a prior case, cannot be considered harmless when it could totally undermine the defense offered. Viewed as a whole, the petitioner's trial was constitutionally unfair. The petitioner deserves the writ, but he also deserves to be retried.

Reversed and remanded for the entry of an order granting the petition for a writ of habeas corpus provided the State of Indiana does not retry petitioner within 120 days.

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[7] *continued*

was when he was riding alone with Dudley down a particular route referred to as "12."

> Q What was your purpose in going down 12 that day?
>
> A Me and Kenny [(codefendant Kennis Butler)] was going to rob a liquor store out there.

Defense counsel immediately objected and moved for a mistrial. The motion was denied, but the judge struck the testimony and admonished the jury to disregard the last answer.

The state argues that, although petitioner was in the car at the time, the conversation did not pertain to him. It involved Pointer and another codefendant, but did not directly implicate Dudley. We believe that the trial judge's efforts to cure the possibly prejudicial effect of this testimony in isolation were sufficient to eliminate any prejudice to petitioner resulting from his association with the other two defendants. However, this testimonial episode did not add to the fairness of this trial.

APPENDIX

The opening portion of the direct testimony of Edward Pointer, Transcript pages 0618-22:

A Edward Pointer.

Q Do you have a nickname?

A Eddie.

Q Any other nickname?

A No.

Q Where do you live, Eddie?

A 560 Pierce in Gary, Indiana.

Q Who do you live there with?

A My aunt.

Q How long have you lived with your aunt?

A All my life.

Q Where is your mother?

A She's there in Chicago.

Q And your father?

A I don't know.

Q How old are you, Eddie?

A 23.

Q Eddie, how do you feel about testifying here today?

A Nervous. Really don't feel up to it.

Q Why not?

A Just nervous.

Q Are your aunt and your girlfriend in the courtroom here today?

A Yes.

Q Eddie, you are going to have to talk up a little louder so that the jury and everyone can hear what you say, okay?

A Yes.

Q Why don't you feel up to testify here today?

MR. GERMANN: Objection, Your Honor. The question has been asked and answered.

THE COURT: Sustained.

MS. VAIDIK: Q Why are you nervous, Eddie?

A Just nervous; that's all, period.

Q What has happened to make you nervous, Eddie?

A You kind of upset me this morning, and I got some phone calls last night.

Q Were those phone calls from me?

A No, they was for me and my mother.

Q Do you know who made those phone calls?

A No.

Q Are you afraid for your girlfriend and your aunt if you testify?

A Yes.

Q What are you afraid of?

A Whoever calling.

Q I couldn't hear what you said.

A Whoever called.

Q What are you afraid of?

A May threat or harm my mother or anything.

MR. GERMANN: Your Honor, may we approach the bench?

THE COURT: Yes.

(Whereupon the following discussion was had at the bench outside the hearing of the jury:)

MS. VAIDIK: I am not going to go any further with this line of questioning as to the content of the conversation, and that is the end.

MR. GERMANN: Your Honor, at this time I am going to move for mistrial. It is apparent that the State of Indiana is attempting to introduce evidence that threats were made by and on behalf of the Defendants in this case. There has been no foundation shown that any of these people were directly or indirectly related in that. The inference is clear that is exactly what has happened. I ask that the testimony be stricken, that the jury be admonished to disregard it, and on behalf of McKinley Dudley, I move for mistrial.

MS. RUDASICS-HARPER: On behalf of Defendant Butler, I would join in that motion.

MS. TAPOCSI: On behalf of Rodney Phillips, I would join in that.

MS. VAIDIK: I think it is plausible to go to the demeanor of the witness, why he is in the condition that he is right now. I think that is something the jury should know. We have not gone into any threatening communications or any such thing, just how the Defendant feels about testifying here.

MR. GERMANN: Your Honor, that may be true, but the prejudicial effect of that certainly outweighs any potential relevance it has to this man's demeanor.

MS. VAIDIK: There has been no implication made whatsoever as to who made those phone calls or what, in fact—

MR. GERMANN: That is the point, Your Honor.

MS. VAIDIK: He says he doesn't know.

THE COURT: Motion for Mistrial will be denied. I will allow the testimony to stand. I will not—if anything further needs to be done on that on cross-examination, fine, but motions will be denied.

(Which concluded the discussion held at the bench.)

COFFEY, *Circuit Judge*, dissenting. This court stated in *United States ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1014 (7th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985) (quoting *United States ex rel. DiGiacomo v. Franzen*, 680 F.2d 515, 517 (7th Cir. 1982)):

> "Under 28 U.S.C. § 2254, a federal court is authorized to issue a writ of habeas corpus on behalf of a person in custody under the judgment of a state court 'only on the grounds that [the petitioner] is in custody in violation of the Constitution or laws and treaties of the United States.' *Because the admissibility of evidence in state court is a matter of state law, evidentiary questions are not subject to federal review under § 2254 unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right.*"

(Emphasis added). The majority concludes that a mere alleged *evidentiary* error (the inclusion of Edward Pointer's testimony that he was threatened) was so prejudicial as to engender fundamental unfairness in defendant Dudley's trial, in violation of the fourteenth amendment. I am convinced, as was the trial court, the reviewing Indiana Supreme Court and the reviewing district court, that the probative value of Pointer's threat testimony outweighed any danger of unfair prejudice resulting from its admission, Fed. R. Evid. 403,[1] and thus neither compromised the "fundamental fairness" of the defendant's trial nor denied him "a specific constitutional right." *United States ex rel. Foster*, 741 F.2d at 1014.

Further, even assuming arguendo that the trial court erred in admitting Pointer's threat testimony, I would not

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[1] Rule 403 of the Federal Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

hesitate to affirm Dudley's conviction as the evidence of his guilt was "overwhelming," *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir. 1987), and any trial court error in admitting that testimony was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). Accordingly, I respectfully dissent.

I

McKinley Dudley was tried and convicted before a jury in Porter County, Indiana, of aiding a bank robbery. The evidence adduced at trial revealed that Edward Pointer, Kennis Butler, and Rodney Phillips[2] traveled in a blue and white Oldsmobile to the Chesterton State Bank to commit a robbery on May 27, 1982. Together with Dudley they had planned the bank robbery several days before; in fact, Dudley had volunteered the use of his car and guns. On the day of the bank robbery, Dudley followed the Oldsmobile a short distance to the bank in his own car, then parked where it was agreed the accomplices would later switch cars to facilitate their escape. Once at the bank, Butler and Phillips, armed with handguns, entered. Butler pointed a gun at a teller, Kay Leggett, entered the tellers' area, and removed approximately $8,835.00. Butler and Phillips then fled to the Oldsmobile where Pointer was waiting. The bank authorities immediately notified the Portage Police Department.

After receiving a description of the armed robbers and their vehicle on a police radio dispatch, Portage Police Officers Fred Trathen and Charles Heimberg, driving in separate squad cars, observed and immediately followed a car with three occupants fitting the radioed description. After the officers were unsuccessful in their attempt to stop the car, a high-speed chase with speeds in excess of 100 miles per hour ensued on Interstate 94. Phillips,

[2] Phillips has a pending writ of habeas corpus in the Northern District of Indiana.

sitting in the rear car seat, fired four gunshots at Officer Trathen. The pursued car finally came to a sudden stop on the side of the road. All three passengers attempted to flee but were apprehended shortly thereafter.

Three witnesses for the state, Edward Pointer, Cecil Lewis (who had known Dudley for about 20 years), and Gerri Peters (Dudley's girlfriend), provided the evidence linking Dudley to the bank robbery.

At trial, Lewis testified that the perpetrators discussed plans for the bank robbery in Dudley's presence on three separate occasions: two days in advance of the crime, again at Dudley's house the day before the crime, and finally, as Pointer also testified, at the Nova Lounge the day of the crime. Lewis further recited that Dudley had supplied the bank robbers with the guns that were necessary for the bank robbery. Both Lewis and Pointer testified that the bank robbers agreed at the Nova Lounge to split their shares of the bank robbery loot equally, and both confirmed that Dudley told his accomplices that he was supplying his car and the guns to be used in the robbery. Pointer added that Dudley went so far as to check Butler's gun to make sure it was working properly.

According to Lewis, the robbers agreed at the Nova Lounge to have Dudley drive his green Cadillac as a getaway car. In addition, the plan called for Pointer to drive the blue and white Oldsmobile belonging to Dudley's girlfriend to the bank and immediately after the robbery to exchange the cars at a designated point known to Dudley. Lewis testified that as the robbery plans proceeded, Pointer, Butler and Phillips went to rob the Chesterton State Bank while he and Dudley went to the car-transfer point to await the arrival of the robbers and switch cars from the one used in the robbery to facilitate the bank robbers' getaway. As it turned out, while the robbery was in progress, Dudley decided he did not agree with the previously designated switch point, and he left the scene at this time.

Dudley's girlfriend, Gerri Peters, testified that she saw Dudley show Lewis his guns prior to the bank robbery, and she later identified those same guns as the ones used in the bank heist. Peters also confirmed that Dudley borrowed her Oldsmobile allegedly because he was concerned about a "bent rim on the back" of his Cadillac. Later that day, Dudley, upon seeing Peters, stated that he had let "a friend" use her car and that he would return it later. Further, Peters confirmed that it was her car that was being held by the Portage Police Department (following the capture of the bank robbers).

In his testimony, Dudley denied participation in the bank robbery and explained his contacts with the defendants as resulting from an agreement he had made with Lewis to fix a friend's car on the date of the bank robbery. However, the car that was allegedly to have been repaired was not even in Portage, Indiana (the actual destination of Dudley and Lewis), but was in Aetna, a neighborhood of Gary, Indiana, 15 miles from Portage. While traveling together, Dudley never questioned Lewis as to why the two were heading towards Portage even though Dudley knew full well the broken down car was in Aetna, thus casting substantial doubt on the veracity of his alibi.

During the prosecutor's direct examination of Pointer, the inquiry which constitutes the challenged testimony took place. After the prosecutor asked a few preliminary background questions, then Pointer was asked "How do you feel about testifying here today?" After the witness responded that he was "nervous," the prosecutor inquired why he was nervous. The witness stated, "You kind of upset me this morning, and I got some phone calls last night." Pointer further testified that he did not know who made the phone calls to him, and that he was concerned that whoever made the calls would harm his girlfriend or members of his family if he testified.[3]

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[3] He did not elaborate on what the prosecutor may have done to upset him.

Pointer, after expressing concern for the safety of his girlfriend and aunt, testified that he was afraid that the caller "[m]ay threat or harm my mother or anything." At that point, Dudley's counsel asked to approach the bench with the prosecutor and objected to this line of questioning. During a sidebar conference, the prosecutor immediately indicated that she was not going to pursue the present line of questioning any further. Defense counsel asked that the testimony be stricken, that the jury be admonished to disregard it, and that a mistrial be granted, contending that the state was trying to create the inference that the threats were made on behalf of the petitioner. The record discloses that the defense counsel did not at any time during the trial question the fact that Pointer was nervous, and further, defense counsel failed to substantiate his reason for stating that Pointer's testimony implied that the alleged threats were actually made on behalf of Dudley, as opposed to either or both of the other two co-defendants on trial. On the other hand, the prosecutor defended her questions as an attempt to explain to the jury the "demeanor of the witness, why he is in the condition [nervous] he is right now." Further, the prosecutor stated "[w]e have not gone into any threatening communications or any such thing, just how the defendant feels about testifying here." Defense counsel responded that "the prejudicial effect of [the testimony] outweighs any potential relevance as to [Pointer's] demeanor." The trial judge denied the motion for mistrial and allowed the testimony to stand.[4] The prosecutor then began a new line of inquiry. This testimony took place on the second day of a more than two-week trial.

After the trial, the jury found the petitioner guilty of aiding the bank robbery, and he received a 20-year prison

[4] The trial judge did not issue a bar to any further inquiry; thus defense counsel had ample opportunity on cross-examination and in his closing argument to address or explain the alleged prejudicial questioning.

sentence which was enhanced by 30 years for being a habitual offender under Indiana law.

II

This court and other circuits have properly weighed and accepted the probative value of threat evidence. *United States v. Peters*, 791 F.2d 1270, 1291 (7th Cir. 1986), *United States v. Guerrero*, 803 F.2d 783, 786 (3d Cir. 1986), *United States v. Qamar*, 671 F.2d 732, 736 (2d Cir. 1982). Surprisingly, the majority chooses to apply Indiana appellate case law, rather than federal case law (cited below) which holds contrary to the case at hand, calling threat evidence "so prejudicial to a defendant that no jury could be expected to apply it to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant." *Keyser v. State*, 160 Ind. App. 566, 569, 312 N.E.2d 922, 924 (1974).

Despite this statement of Indiana law (which is clearly not controlling in a federal habeas case), properly applicable federal case law holds that threat testimony, whether allegedly linked to the defendant or giving the inference that the threats were made on behalf of the defendant, is judged in "the normal balancing processes of Fed. R. Evid. 403 balancing." *United States v. DeLillo*, 620 F.2d 939, 944 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980). As noted above, various federal courts have properly determined that threat testimony has probative value and does not necessarily unfairly prejudice a defendant. The Second Circuit, in *Qamar*, 761 F.2d at 736, specifically allowed threat testimony to establish the credibility of a witness who gave testimony wholly inconsistent with that offered by the defendant and to explain that witness's demeanor as related to the judging of credibility. That court ruled "the threat evidence was useful to explain the demeanor of [the witness], who 'testified in an almost inaudible voice, speaks quickly . . . [and] displays on the stand some tendencies to want to get out of here and to get the questioning over with.' " *Id.* (citation omitted).

Here, Pointer's nervousness on the stand, uncontested by defense counsel, obviously put his credibility as a witness in doubt; thus an inquiry into an explanation of his demeanor was proper.

Not only are the Indiana cases cited by the majority inapplicable in this federal habeas proceeding, but these cases are also distinguishable from the case at hand. This case involves three defendants on trial while the Indiana cases cited each involve only one defendant. The majority's analogy is misplaced, and it is more than difficult to ascertain how the majority can conceivably conclude that Pointer's limited testimony in any way implicated Dudley specifically as having been responsible for the alleged threats made as opposed to either one or both of the other two co-defendants. Because of the vague nature of Pointer's limited testimony, it is obvious that the majority is only speculating as to who may have made the threats if they were threats. I am convinced that because of the vague and passing nature of Pointer's alleged threat testimony, considering it represented a mere two and one-half pages of a more than 1,400-page transcript and considering that defense counsel failed to cross-examine the witness, argue to the jury, much less file a post-trial motion for mistrial regarding this issue, it confounds me as to how Dudley was unfairly prejudiced. Furthermore, I do not understand the speculation that the jury considered the testimony in regard to anything other than Pointer's demeanor.

Overall, Pointer's testimony refuted Dudley's alibi, denying any participation in the bank robbery. Obviously, the jury faced the credibility issue head on and determined which party it believed. It is well known that the nervous demeanor of a witness can cast damaging suspicion of untruthfulness over a witness's testimony in a jury's mind. A prosecutor is often called upon to attempt to bolster the credibility of his witnesses within ethical and proper guidelines; thus from my review of the record and the applicable federal case law I see no problem with the prosecutor's limited attempt in this case to explain the problem of nervousness surrounding Pointer's testi-

mony. As the Appellees' brief points out, matters which reflect upon the credibility of a witness are proper subjects for exploration at trial. *Saladino v. Walker*, 609 F.2d 1211, 1214 (7th Cir. 1979), *United States v. Aleman*, 609 F.2d 298, 307 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). If we are to hold that a prosecutor is not allowed to explain a witness's nervous demeanor on the stand through proper questioning, the weight of his or her testimony will often be greatly diminished.

The majority questions whether Pointer was nervous in the first place, stating, "[i]t is difficult for us to detect 'any extreme nervousness' from the record." It is interesting to note that neither opposing counsel nor the trial judge contradicted the prosecutor's observation of nervousness and statement. I believe that the trial judge was in a far better position to make that judgment and make the proper ruling as he did in this case relating to the witness's demeanor; thus our review should be consequently deferential. Speculation by the majority as to a witness's behavior is misplaced in this case considering we have nothing in the record before us to support the majority's conclusion. In weighing the effect of testimony, the trial court's "exercise of broad discretion will not lightly be disturbed[,]" *United States v. Williams*, 596 F.2d 44, 50 (2d Cir.), *cert. denied*, 442 U.S. 946 (1979), due to its proximity.

The majority tries to offer as analogous the Indiana Supreme Court case, *White v. State*, 257 Ind. 64, 272 N.E.2d 312 (1971), but I fail to understand the suggestion that the Pointer testimony offered by the prosecutor "was intended more to prejudice" the petitioner "than to explain away any nervousness of the witness." That case had nothing to do with threat testimony, and the analogy drawn is misconceived. The *White* case involved a prosecutor's eliciting testimony by a police officer about a past armed robbery involving the defendant for no valid reason. In the case at hand, the prosecution had a valid reason to question Pointer as to why he appeared nervous on the witness stand—the threatening phone call. The con-

clusion reached by the majority as to the prosecutor's intent, in my humble opinion, is nothing more than mere speculation and lacks a foundation. I refuse to attempt to read a motive into the prosecutor's questioning other than the obvious one explaining a nervous witness's demeanor. I would agree that if the prosecutor had a past record of using questionable trial tactics, such as " 'flavorings' of the record, which assign improper motives to judicial determinations," *United States v. York*, No. 87-1714, slip op. at 12 n.4 (7th Cir. July 7, 1988), the majority's speculation may lead to an assumption that could conceivably have some validity. However, because I believe the prosecutor acted in a proper manner, I cannot agree with the majority's speculation.

Dudley argues that Pointer's threat testimony greatly impacted on the jury's decision. Yet, his counsel, at trial, chose not to cross-examine Pointer regarding the threats, although he had ample opportunity. Nor did the petitioner's counsel think it was important enough to address the alleged impact of the threats in his closing argument, where he had more than ample opportunity. Why, if the threat testimony was so important and so prejudicial to his client, didn't the petitioner's counsel file a post-trial motion for judgment of acquittal or a new trial?

In sum, the alleged threat testimony was elicited as part and parcel of an entirely proper line of inquiry into the witness's demeanor (nervousness), a question which was crucial to his believability. While the unsupported testimony from a witness that he or she received an alleged threat may properly be regarded as unfairly prejudicial, particularly when aimed at one defendant in a one-defendant trial, the value of this testimony and the circumstances under which it was elicited must be weighed against that prejudice. Doing so, I am convinced that any prejudice resulting from the limited inquiry into threats the witness may have received is "substantially outweighed" by the probative value of such an inquiry.

III

Assuming, arguendo, that the balance of probative value versus prejudice should have been struck against admissibility, I have no doubt this mere alleged evidentiary error should be considered "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. In deciding whether or not a constitutional error is harmless, the Supreme Court stated: " 'The question is whether there is a *reasonable* possibility that the evidence complained of might have contributed to the conviction.' " *Id.* at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230 (1963)).

This circuit noted in *United States ex rel. Bradley v. Lane*, 834 F.2d 645, 651 (7th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1746 (1988), errors that have no "likelihood of changing the result of the trial, . . . [or] . . . denying [a defendant] a fundamentally fair trial" should not mandate reversal of a conviction. The Supreme Court has also noted that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States v. Lane*, 474 U.S. 438, 445, 106 S.Ct. 725, 730 (1986) (quoting *United States v. Hastings*, 461 U.S. 499, 509, 103 S.Ct. 1974, 1980 (1983)). Because the testimony in question lasted only one minute in a more than two-week-long trial and did not specifically implicate Dudley, I am convinced that it was of no consequence in the conviction of Dudley.

The Supreme Court recognized that "given the myriad of safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error free, perfect trial, and . . . the Constitution does not guarantee such a trial." *Id.* (quoting *Hastings*, 461 U.S. at 508, 509). The Court has "repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.' " *Rose v. Clark*, 478 U.S. 570, ____, 106 S.Ct. 3101, 3107 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986)). I am confident that Pointer's

threat testimony did not contribute to the jury's decision to convict Dudley of aiding a bank robbery. It was part of a brief exchange that represented only two and one-half pages in a trial transcript of more than 1,400 pages in a trial of over two weeks' duration, and it was testimony that was never even referred to again by either party. Defense counsel had ample opportunity, on cross-examination, in closing argument, and in post-trial motions to address the pertinent testimony but chose not to, thus convincing me, as it did the trial judge, the Indiana Supreme Court, and the habeas court, of the insignificant part it played in convicting Dudley.

The testimony of Lewis, a 20-year associate of Dudley and a co-conspirator in the bank robbery, and the testimony of Peters, Dudley's girlfriend, directly linked Dudley to the crime and was no doubt considered "overwhelming" in the jury's mind. Additionally, Pointer's corroborating testimony and the lack of a valid and truthful alibi by Dudley obviously left no doubt in the jury's mind of his guilt.

Dudley's alibi lacks believability. He claims that he traveled to Aetna with Lewis in order to fix a broken down car. Inexplicably, the pair wound up in Portage, 15 miles away, where the bank robbery took place. In his testimony, Dudley claimed he was unaware of what was to take place in Portage. I find it impossible to believe, as did the jury, the naivete of a 47-year-old habitual criminal who has spent more than one-half of his life (approximately 25 years) in prison and who, according to witnesses, was the mastermind in the planning of the bank robbery. Dudley discussed the robbery plan on more than one prior occasion and went so far as to not only arrange for the cars but also supplied the guns to be used. Yet, he insists he was only in the town where the bank was located to fix a car, a car that he knew was actually 15 miles away in another town.

Beyond doubt the evidence to convict Dudley was "overwhelming," *Savory*, 832 F.2d at 1020, and Pointer's threat

testimony did not contribute to the jury's decision. The majority, instead, chooses to downplay the plethora of evidence, stating that "[t]he evidence of the petitioner's guilt was impressive but not overwhelming." Dudley, in organizing the bank robbery, participated in several discussions of the robbery plan prior to the actual crime, including the one that took place in his own home. Secondly, he supplied the necessities, the cars and guns, to facilitate the plan and even went so far as to check out the operating capabilities of one of the co-defendant's guns prior to the bank robbery. He was present when the parties agreed to the division of the robbery loot equally. He drove with Lewis to the planned switching point where the robbers were going to change cars after the bank robbery. He told his girlfriend that he let "a friend" use her car when in fact he planned for its use in facilitating the robbery. And finally, he offers no valid explanation for his presence in Portage on the day the armed robbery took place. I am convinced, as was the jury, the Indiana Supreme Court, and the district court, that the evidence of Dudley's guilt was "overwhelming."

Further, Dudley's role in planning the bank robbery clearly demonstrates to me that he in fact was "the mastermind" of the entire crime. Dudley was much older than his accomplices and was a pro in criminal matters.

The majority tries to downplay the key testimony of the accomplices, Lewis and Pointer, stating that "admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious." When reviewing the sufficiency of the government's evidence, courts must view all the evidence, drawing all reasonable inferences therefrom in the light most favorable to the government. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); *United States v. Abayomi*, 820 F.2d 902, 905. We must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986). A review of the trial transcript compels an affirmative response to this ques-

tion. It is well settled that matters of credibility are inherently within the province of the jury, and "absent extraordinary circumstances," this court should not reevaluate the testimony of witnesses to examine their motives or other measures of reliability. *United States v. Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987). Further, "the fact that [the witness] has consistently lied in the past, engaged in various criminal activities, thought that his testimony would benefit him . . . does not make his testimony unbelievable." *United States v. Rivera*, 775 F.2d 1559, 1561 (11th Cir. 1985). *See also United States v. Cravero*, 530 F.2d 666, 670 (5th Cir. 1976). As the Eleventh Circuit has stated, "[a] judgment of acquittal 'is not required because the government's case includes testimony by an array of scoundrels, liars and brigands.' " *Rivera*, 775 F.2d at 1561 (quoting *United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981). Thus, the testimony of Lewis and Pointer should not be besmirched simply because it was given as part of a plea agreement. "In this imperfect world, a litigant must often take the witness as he or she is, imperfections and all. We cannot expect that witnesses will possess the credibility of people of the cloth, such as rabbis, priests, and nuns; that is why one of the jury's roles is to decide the credibility of witnesses." *United States v. Rovetuso*, 768 F.2d 809, 819 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986). The two witnesses were key players in the bank robbery and their testimony, in general, corroborated the state's claims and was believed by the jury. Further, Indiana Pattern Jury Instruction 12.31[5] used as a jury charge in this case stresses that an accomplice's testimony

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[5] Indiana Pattern Jury Instruction 12.31 states in full:

"An accomplice witness is one who testifies that he was involved in the commission of a crime with the defendant. An accomplice is competent as a witness for the State or the defendant in the trial of criminal cause. The testimony of an accomplice is to be received and weighed by the jury in the same manner and according to the same rules as the evidence of any other witness."

"is to be received and weighed by the jury in the same manner and according to the same rules as the evidence of any other witness."

The majority overlooks that jury charge to weigh the accomplice's testimony "in the same manner and according to the same rules as the evidence of any other witness" and casts aside the damaging testimony of Peters linking Dudley to the cars and guns used in the bank robbery. The testimony of Lewis, Pointer and Peters was believed by the jury, and I am convinced that it should be given its proper weight.

Contrary to the claims of the majority, the testimony of the accomplices, Lewis and Pointer, did not conflict in any important material respect. Pointer confirmed Lewis' testimony that prior robbery plans had been made at the Nova Lounge. Lewis confirmed Pointer's testimony that he was told by Dudley that Dudley's car and guns were going to be used in the bank robbery. Also, Pointer confirmed Lewis' testimony about the location of a switching point and about the division of the proceeds among the robbers. Any conflicts in their testimony were of no consequence.

Upon review of the record and the applicable case law, Dudley has failed to persuade me that the trial court abused its discretion and that his fourteenth amendment rights were violated. I agree with the trial court, the Indiana Supreme Court and the district court that Pointer's testimony was properly admissible. Also, I am convinced, as was the district court, that Dudley's claim did not amount to a denial of fundamental fairness and thus does not rise to the level of a constitutional violation.

IV.

I respectfully disagree and dissent from the majority's decision and would affirm the order of the other three judicial tribunals and deny Dudley's petition for a writ of habeas corpus.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

McKINLEY DUDLEY

Petitioner

v. NOR No. S 85-491

JACK DUCKWORTH, Superintendent, and
INDIANA ATTORNEY GENERAL

Respondents

MEMORANDUM AND ORDER

I.

At the outset it should be noted that this petitioner is the same person as in case of *McKinley Dudley v. United States of America*, H 86-188, upon which this court has recently taken action.

In this cause McKinley Dudley seeks relief under Title 28 U.S.C. § 2254. McKinley Dudley is presently incarcerated at the Indiana State Prison pursuant to a state conviction for aiding a robbery as a result of a trial by jury in October 1982. As a result of bifurcated proceedings he was also convicted as an habitual offender and was sentenced to a term of 20 years imprisonment on the aiding a robbery offense and a consecutive term of 30 years for being an habitual offender. Dudley appealed his conviction to the Supreme Court of Indiana which unanimously affirmed it in an extensive opinion b,y Justice Pirvanik as reported in *Dudley v. State*, 480 N.E. 2d 881 (Ind. 1985). The opinion of Justice Pirvanik covered 11 issues and extends from page 881 to page 907 in that reported decision. The facts therein found are subject to the mandates of *Sumner v. Mata*, 449 U.S. 539 (1981); see also 455 U.S. 591 (1982).

It appears that all the issues raised here were raised in the Supreme Court of Indiana. The issues raised here are:

> 1. The Court erred by its denial of Petitioner (sic) motion for Discharge based on Indiana Rule of Criminal Procedure 4 (B)(1) and (2).

2. The Court erred in denying Petitioner's motion for mistrial after the State of Indiana introduced evidence that a crucial state's witness, Edward Pointer, or his family had received threats when he testified without any evidence whatsoever to connect any of those threats the Defendants/Petitioner, thereby denying Petitioner his right to a fair and impartial trial, due process and his right to confront the witness against him.

3. The Court erred in granting the State's motion for joinder, thereby including the Petitioner,
an alleged accessory, to be tried in a case where there was overwhelming evidence against the principals, therefore denying the Petitioner due process and a fair and impartial trial.

4. The Court erred in failing to exclude evidence that the Petitioner Dudley did not say anything to the police when first arrested, thereby commenting on the Petitioner's right to remain silent in violation of his Fifth Amendment right, due process of law and his right to a fair and impartial trial guaranteed to him by the Constitution of the United States under the Miranda decision.

5. The Court erred by failure to reveal to the Defendant/petitioner that Cecil Lewis, an accomplice witness, had perjured himself when he indicated he was not an F.B.I. informant, thereby precluding the jury from hearing the total consideration given by the State of Indiana or the Federal Government in exchange for his testimony and cooperation in this case . . . (and) that Gerri Peters, a crucial state's witness has "half a brain" due to surgery she had received in the past.

6. The Court erred in sentencing the Defendant/petitioner
to a determinate term of twenty (20) Years for a Class B felony when an examination of the Charging Information sets forth the element of a Class C. felony only . . .

7. The Court erred in allowing Cecil Lewis, accomplice, to testify in the nature of an evidentiary harpoon that he and Defendant Butler intended to rob a liquor store.

8. The Court erred in permitting the jury to hear evidence of a third felony which was not proven to be a "prior unrelated" felony in the Habitual Criminal portion of said trial, thereby prejudicing the Defendant/petitioner and denying his right to a fair and impartial trial and due process of law.

9. The Court erred in denying the Defendant/petitioner's request for copies of investigator's notes regarding interviews of defense witnesses which were used by the State to cross-examine tbose witnesses, thereby denying the Defendant an opportunity to cross-examine and confront the State's witness who purportedly (sic) authored said reports, his right to a fair and impartial trial and due process of law.

10. The Court erred in denying the mistrial motion after the jury saw the Petitioners in handcuffs and restraints the first day of trial.

11. The Court erred in failing to sentence the Defendant/petitioner within thirty (30 days after conviction. IC 35-4.1-4-2 (since repealed) and criminal Rule 11 to require the Court to impose sentence after conviction within 30 days. Defendant/Petitioner (sic) Dudley objected to the delay. No hearing was held and the record fails to disclose a reason for said delay.

The state court record has been filed here and examined pursuant to the mandates of Townsend v. Sain, 372 U.S. 293 (1963).

II.

A.

The petitioner first lodges a complaint with regard to the alleged violation of the speedy trial provisions of Indiana Rule of Criminal Procedure 4(B)(1)(2). Any issue as to tbe timeliness of his trial under the Criminal Procedural Rule of Indiana do not here rise to the level of a constitutional issue under the Fourteenth Amendment of the Constitution of the United States and the petitioner fails to make a Sixth Amendment speedy trial claim under the factors considered in *Barker v.*

Winqo, 407 U.S. 514 (1972). He has wholly failed to establish any prejudice resulting from the delay.

B.

Dudley next complains of a brief reference by the witness Pointer who appeared nervous on the witness stand. The witness Pointer referred to some threatening phone calls received the night before his testimony but did not link any of the defendants then on trial including Dudley to those calls. The Supreme Court of Indiana held that the state trial court judge did not abuse his discretion in denying a motion for a mistrial and this court does not conceive that the Constitution of the United States is here implicated in that decision. It was a very small incident in a fairly lengthy proceeding and does not amount to a denial of a fundamental fairness. See *United States ex rel DiGiacomo v. Franzen*, 680 F. 2d 515 (7th Cir. 1982).

C.

Dudley appears here to also complain about his trial with two other defendants namely, Kennis Butler and Rodney Phillips. Again, the procedure of a joint trial generally does not implicate the Constitution of the United States and it certainly does not here. In addition, there is a near total failure by Dudley to show any prejudice here resulting from the joint trial. The evidence as reflected in the record and in the Supreme Court's opinion is very strong as to all of the defendants including Dudley and he simply cannot argue prejudice from the fact that he was convicted on such evidence.

D.

Dudley raises a more serious problem with regard to a reference to his refusal to talk to Officer Keith Burden when that officer sought to interview Dudley at his residence and he declined to talk. Certainly the state prosecutor would have been well advised to have avoided that sensitive area. Since *Miranda v. Arizona*, 384 U.S. 436 (1966) as well as *Edwards v. Arizona*, 451 U.S. 477 (1981) both state and federal prosecutors must be extremely careful to avoid references to this kind of silence by a defendant in a criminal case.

It is to the credit of the state trial judge that he took all appropriate action in striking the answer and admonishing the jury to disregard it. That judge could have done no less. There is no evidence in the record that any effort was made by the prosecutor to further argue or refer to the defendant's silence. There is not here the kind of prosecutorial argumentative reference to silence that was apparent in the record in *Phelps v. Duckworth*, 757 F. 2d 811 (7th Cir. 1985) *reh'q qranted*, 772 F. 2d 1410 (7th Cir. 1985)(en banc).

In *U.S. ex rel Crist v. Lane*, 745 F. 2d 476 (7th Cir. 1984) prosecutorial conduct which far exceeds anything charged here was held not to violate the due process clause of the Fourteenth Amendment. A full examination of the state record fails to disclose a violation of the values found in *Doyle v. Ohio*, 426 U.S. 610 (1976).

E.

Although this court is reluctant to bottom decisions on harmless error it is the present conviction of this court that this minor incident which was immediately corrected by the state trial judge and was not the subject of any further efforts by the prosecutor simply does not approach the kind of egregious prosecutorial misconduct that has been rightfully condemned in this circuit and elsewhere. There can be absolutely no doubt that given the extremely strong case against Dudley that any error here is harmless beyond a reasonable doubt. See *U.S. ex rel miller v. Greer*, 789 F. 2d 438 (7th Cir. 1986), Part III of Judge Flaum's majority opinion and the opinion of Chief Judge Cummings in *Phelps v. Duckworth*, 772 F. 2d 1410 (7th Cir. 1985) at page 1411.

F.

Dudley next makes argument that there were certain items of evidence withheld by the prosecutor in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976). Dudley asserts that a conversation between a police officer and the prosecutor was overheard while the jury was out in deliberation and that the police officer allegedly

stated that one Cecil Lewis had worked as an F.B.I. informant and that one Gerri Peters was mentally impaired due to brain surgery.

It does not appear in the record that Cecil Lewis was asked any question at trial relating to his status as an F.B.I. informant so it is hard to visualize what the alleged perjury or deliberate deception might be in that regard. This court is in agreement with the lengthy statement of
Judge Pivarnik at pages 901-902 of the Supreme Court's opinion where he stated:

> Applicants claim the trial court erred by not granting a new trial when the State failed to comply with general discovery orders. Appellants advance four separate instances to support their claim. First Appellants allege the State's failure to disclose Cecil Lewis' occupation as an F.B.I. informant and that Gerri Peters had a brain impairment due to surgery was of such prejudicial impact as to merit a reversal. A trial court is granted deference in finding what constitutes substantial compliance with its discovery order. Absent clear error, the trial court's decision will not be overturned. *Hunt v. State* (1983), Ind., 455 N.E. 2d 307. Further, a prosecutor's duty to disclose evidence other than that which is particularly requested can be measured by determining whether the evidence is so obviously exculpatory that the failure to disclose it would deny defendant a fair trial. *Richard v. State* (1978), 269 Ind. 607, 383 N.E. 2d 899. cert. denied, (1979) 440 U.S. 965, 99 S. Ct. 1515, 59 L. Ed. 2d 781. Further, omitted evidence as evaluated in the context of the entire record, must create a reasonable doubt that did not otherwise exist. *United States v. Agurs* (1976), 427 U.S. 97, 112-113, 96 S. Ct. 2392, 2401-2402, 49 L. Ed. 2d 342, 354-355.
>
> It is notable in the case at bar that the information undisclosed to the defense is not directly exculpatory, rather it is impeaching evidence. The only evidence before the trial court and before this court that Cecil Lewis was an F.B.I. informant and Gerri Peters was mentally impaired due to brain surgery is an affidavit filed by the

> defense claiming the Prosecutrix and Officer Kiser had indicated these matters in a conversation after the jury had retired for deliberation. Officer Kiser failed to recall making any statements giving any indication that Cecil Lewis was an F.B.I. informant and Gerri Peters was mentally impaired. In light of the fact that such alleged evidence was merely impeaching in nature, as opposed to directly exculpatory, and the weak evidence support the allegation that the Prosecutrix intentionally withheld exculpatory evidence, we do not find the trial court erred in denying a new trial or that Appellants were denied a fair trial.

This Court cannot conceive that given the best of it for Dudley that the nondisclosure of the aforesaid information would have had any impact whatsoever on the outcome of his trial.

G.

Dudley next complains that he could not be sentenced under the law of Indiana as a Class B felon apparently because the charges did not expressly contain the word "armed". This appears to be a state law claim which does not rise to a federal constitutional level. It is highly doubtful that this petitioner can argue a failure of due process or lack of notice under the Fourteenth Amendment of the Constitution of the United States. Due process requires that the charges against a criminal defendant be stated with sufficient certainty to enable that defendant to prepare an adequate defense as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States. The Supreme Court of Indiana found that Dudley was fully aware of the charges against him and this court is in total agreement with that conclusion. There was more than sufficient evidence to convict him of the charge of aiding a Class B robbery, that is an armed robbery, and the sentence is within the statutory authority of the state judge who imposed it.

H.

There was evidence that Cecil Lewis had happened to mention that the Chesterton State Bank robbery, the one for which

Dudley was convicted, was first discussed in the presence of Lewis at a time when Lewis and the co-defendant Kennis Butler were going out to rob a liquor store. All of the defendants including Dudley moved for a mistrial and the state trial judge denied the mistrial motion. The state trial judge did order the answer struck and admonished the jury. It is correct that Dudley must here show a violation of his due process rights and prejudice resulting therefrom. In this evidence Dudley was not even mentioned as was emphasized in the opinion of Justice Pivarnik. This was an isolated incident in a lengthy trial which was handled appropriately by the state trial judge and there is no indication of a violation of due process.

I.

During the bifurcated proceeding regarding the status of McKinley Dudley as an habitual criminal Dudley moved the state trial court for an order striking one of three prior unrelated felony convictions from the habitual offender count. The state trial court ordered a 1976 felony conviction stricken since the exact date of that conviction was not established. Dudley apparently now complains that he was prejudiced since the allegation of more than two felony convictions made it easier for the jury to determine he actually had two valid felony convictions.

This court has been made aware of the care with which the state prosecutor must proceed with proof of prior offenses on the charge of habitual offender. See *Williams v. Duckworth*, 738 F. 2d 828 (7th Cir. 1984). There is nothing in this record that violates the values there announced.

Under the law of Indiana it is settled that the proof of three or more felony convictions should be treated as surplus. If actual proof of more than two felonies is treated as surplus it is not reversible error to allege excess felonies even though they are not subsequently proven. In this case the state prosecutor simply alleged one previous conviction that he failed to prove and the state trial judge appropriately struck that unproved prior conviction from the record. The facts are that the neces-

sary number of felonies were proven beyond a reasonable doubt in order to sustain the conviction of habitual offender. It is very difficult to see how the due process clause of the Fourteenth Amendment is here implicated.

J.

There was a last minute defense witness named Regina Aldridge. She apparently had been hurriedly interviewed by police authorities and some notes made. The complaint is now that those notes should have been produced by the prosecutor. Obviously if this is only a state law issue it does not per se rise to a constitutional level. In a general sense there is no absolute and complete constitutional right to discovery in criminal cases that discovery once permitted should be reciprocal. See *Weatherford v. Bursgy*, 428 U.S. 545 (1977) and *Wardius v. Oregon*, 412 U.S. 470 (1973). The issue here is certainly not reciprocal discovery. The issue is whether the state prosecutor failed to provide the defendants with notes of one interview with an unanticipated defense witness. The Supreme Court of Indiana at page 902 of its opinion gave extensive treatment to this question and found that there was no prejudice shown by the unintentional withholding of interview notes because the information contained in those notes was of no surprise to the defendants or their counsel. The defendants and their counsel knew what the witness was going to say and Dudley has never there or here claimed surprise. Given the most liberal reading of *Brady v. Maryland* and *United States v. Agurs* this does not rise to a constitutional level. For a federal criminal case in which this kind of argument was made without success in this circuit see *United States v. Macksy*, 571 F. 2d 376 (7th Cir. 1978).

K.

During the voir dire of the jury in the very earliest stages of the trial apparently Dudley and his co-defendants were brought into the courtroom initially in handcuffs. Counsel for the co-defendant Butler objected thereto and asked that the procedure be discontinued in the future and the state trial judge agreed and such procedure was discontinued.

This court is very familiar with this type of issue and was the author of *Osborne v. Duckworth* 567 F. Supp. 427 (N.D. Ind. 1983), reversed by unpublished order, 757 F. 2d 1293 (7th Cir. 1985). The appearance of a defendant in a criminal case in handcuffs does not per se violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. That is certainly the teaching of *Harrell v. Israel*, 672 F. 2d 632 (7th Cir. 1982). See also *Dillbeck v. Duckworth*, 585 F. Supp. 1074 (N.D. Ind. 1984). In this case the Supreme Court of Indiana found a security need involved and the defendants asked that the practice of bringing them in in handcuffs desist, the state trial judge agreed and the practice ended. In this context the Due Process Clause of the Fourteenth Amendment was not violated.

L.

Dudley also complains that he was not sentenced in a timely fashion, namely, thirty (30) days, under the relevant Indiana statute. The Supreme Court of Indiana found this was in no way sufficient to award him a new trial and in deed, this issue does not begin to rise to a constitutional level. The record here supports such a conclusion.

It is correct that the mandates of *Lewis v. Faulkner*, 689 F. 2d. 100 (7th Cir. 1982) have been fully met bere. A mass of issues have been raised here, in the Supreme Court of Indiana and in the state record. This court has attempted to review them carefully and is mindful that a defendant in a criminal case is entitled to a trial that is substantially fair but a defendant in a criminal case is not entitled to a perfect trial. It is the view of this court based on the record that Judge Robert Roger Bradford of the Superior Court of Porter County, Indiana was confronted with the difficult and complex trial which he handled in a careful and admirable fashion within the framework of the Fourteenth Amendment of the Constitution of the United States. There is no bases for relief under 28 U.S.C. § 2254

presented in the record in this case and such relief is now DENIED. IT IS SO ORDERED.
Enter June 24, 1986.

/s/ Allen Sharp

Chief Judge, United States District Court

cc: Dudley
Steiner

Civ 31
(Rev. 5/85)

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: NORTHERN DISTRICT OF INDIANA SOUTH BEND, INDIANA
CASE TITLE: mckinley dudley V. JACK DUCKWORTH	DOCKET NUMBER: 885 - 491
	NAME OF JUDGE OR MAGISTRATE: ALLEN SHARP

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to ~~trial or hearing~~ consideration before the Court with the judge (~~magistrate~~) named above presiding. The issues ~~have been tried or heard~~ and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to Memorandum and Order entered herein, petition for Writ of Habeas Corpus is DENIED.

CLERK	DATE
RICHARD E. TIMMONS	6/24/86
(BY) DEPUTY CLERK: Eleanor J. Engleman	

Judgment — Oral Argument
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 8, 1988.

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

MCKINLEY DUDLEY, *Plaintiff-Appellant,*	) Appeal from the) United States) District Court for the) Northern District of
No. 86-2293 vs.	) Indiana, South Bend) Division
JACK DUCKWORTH, Warden, and INDIANA ATTORNEY GENERAL, *Respondents-Appellees.*	)) No. 85 C 491) Allen Sharp, *Judge*)

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED for the entry of an order granting the petition for a writ of habeas corpus provided the State of Indiana does not retry petitioner within 120 days, in accordance with the opinion of this Court filed this date.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 7, 1988.

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. DUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

No. 86-2293	) Appeal from the
	) United States
MCKINLEY DUDLEY,	) District Court for the
Plaintiff-Appellant,	) Northern District of
	) Indiana, South Bend
vs.	) Division
	)
JACK DUCKWORTH, Warden, and	) No. 85 C 491
INDIANA ATTORNEY GENERAL,	) Allen Sharp, *Judge*
Respondents-Appellees.	)

ORDER

On consideration of the petition for rehearing and suggesion for rehearing *in banc* filed in the above-entitled cause by respondents-appellees on August 22, 1988, a vote of the active members of the court was requested, and a majority of the active members of the court was requested, and a majority of the active members of the court have voted

to deny a rehearing *in banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in banc* be, and the same is hereby, DENIED.